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8 *and Sierra Club*

9  
10 UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

11 TROUT UNLIMITED, AMERICAN RIVERS,) )  
12 PACIFIC RIVERS COUNCIL, WILD ) Case No.  
STEELHEAD COALITION, NATIVE FISH )  
13 SOCIETY, and SIERRA CLUB, )  
) COMPLAINANT FOR DECLARATORY  
14 Plaintiffs, ) RELIEF  
)  
15 v. )  
)  
16 D. ROBERT LOHN, in his official capacity as )  
Regional Administrator of National Marine )  
17 Fisheries Service Northwest Regional Office, )  
and NATIONAL MARINE FISHERIES )  
18 SERVICE, )  
)  
19 Defendants. )  
20 )

1 INTRODUCTION

2 1. This case challenges: (a) the National Marine Fisheries Service’s (“NMFS”)
3 downlisting of Upper Columbia steelhead from endangered to threatened status, 71 Fed. Reg.
4 834 (Jan. 5, 2006); (b) the new Hatchery Listing Policy on which that downlisting is predicated,
5 Policy on the Consideration of Hatchery-Origin Fish in Endangered Species Act Listing
6 Determinations for Pacific Salmon and Steelhead (“Hatchery Listing Policy”), 70 Fed. Reg.
7 37,204 (June 28, 2005); and (c) NMFS’s denial of a petition to split wild and hatchery salmon
8 and steelhead (collectively “salmonids”) into two separate listing units. Specifically, NMFS
9 lumped wild and hatchery steelhead together and downlisted Upper Columbia steelhead based on
10 the numbers of hatchery fish, even though it also found that those hatchery fish pose a threat to
11 the survival and recovery of the wild steelhead. By treating hatchery fish as eligible for listing
12 status, NMFS acted contrary to the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”),
13 which protects species’ ability to sustain themselves in the wild. By lumping hatchery and wild
14 steelhead into one listing unit and counting the hatchery fish in making listing decisions, NMFS
15 acted contrary to the ESA, disregarded the best available science, and acted arbitrarily and
16 capriciously.

17 PARTIES

18 2. Plaintiff Trout Unlimited (“TU”) is a nonprofit coldwater fisheries conservation
19 organization with national headquarters in Arlington, Virginia. TU is dedicated to the protection
20 of wild trout, salmon, and steelhead fishery resources. TU has approximately 140,000 members
21 nationwide and nearly 10,000 members in Oregon and Washington. TU’s members live and
22 recreate in the Pacific Northwest, and TU has long participated in efforts to protect wild salmon
23 and steelhead. TU has been extremely active in hatchery reform and protections for wild salmon
24 and steelhead over the last five years. For example, in April 2002, TU led 17 other conservation

1 and fishing organizations in a petition to list only the wild salmon and steelhead populations. TU  
2 also filed extensive comments on the proposed hatchery policy, and its members and staff  
3 attended all of the proposed hatchery policy public hearings in California, Oregon, Washington,  
4 and Idaho.

5 3. Plaintiff American Rivers is a national conservation organization with its  
6 principal place of business in Washington, D.C. and a Northwest regional office based in Seattle,  
7 Washington. American Rivers and its approximately 44,000 members, including 2,400 members  
8 in Washington and Oregon, seek to protect and restore America's rivers and the variety of life  
9 they sustain for the benefit of people, fish and wildlife. Through administrative and legislative  
10 advocacy, public education and outreach, and litigation, the Northwest regional office endeavors  
11 to protect and restore the rivers and streams in Washington, Oregon, and Idaho, with an emphasis  
12 on rivers and streams that support wild salmon and steelhead populations.

13 4. Plaintiff Pacific Rivers Council ("PRC") is a non-profit conservation organization  
14 dedicated to the development and implementation of science-based public policies that protect  
15 and restore aquatic ecosystems and the species that depend on them. PRC is incorporated and  
16 has its headquarters in the State of Oregon. PRC has over 750 members throughout the United  
17 States and Canada. PRC members participate in recreational activities, such as hiking,  
18 backpacking, cross-country skiing, nature photography, and river and lake boating throughout  
19 the Pacific Northwest, and, where possible, observe and benefit from wild salmon and steelhead.

20 5. Plaintiff Wild Steelhead Coalition is a non-profit organization with its principal  
21 place of business in Washington State, which is devoted to reversing the decline of wild  
22 steelhead in the Pacific Northwest by addressing the factors, such as over-harvest, poor hatchery  
23 practices, and habitat degradation, which have contributed to that decline. The Wild Steelhead  
24

1 Coalition represents conservationists, recreational fishermen, and businesses that depend on wild  
2 steelhead for their livelihoods and concerned citizens who want to preserve the region's wild  
3 steelhead.

4           6.       Plaintiff Native Fish Society is a non-profit organization, incorporated and based  
5 in Oregon, which advocates for the conservation, protection, and restoration of native fish in the  
6 northwest, including steelhead. The mission of the 350-member organization is to advocate  
7 scientifically sound conservation, protection, and recovery actions for native fish and their  
8 habitats. The Native Fish Society inventories and monitors the status and health of native fish  
9 populations and disseminates educational materials on native fish conservation through scientific  
10 reports, newsletters, action alerts, and the media. Members of the Native Fish Society engage in  
11 recreational and vocational activities to observe and benefit from native fish, including wild  
12 steelhead, in their native streams.

13           7.       Plaintiff Sierra Club is a national environmental organization founded in 1892 and  
14 devoted to the study and protection of the earth's scenic and ecological resources – mountains,  
15 wetlands, woodlands, wild shores and rivers, deserts, plains, and their wild flora and fauna.  
16 Sierra Club has some 60 chapters in the United States and Canada, including chapters in  
17 Washington and Oregon, and a principal place of business in San Francisco, California.

18           8.       Plaintiffs and their members use the watersheds in Washington and Oregon that  
19 are home to Upper Columbia steelhead for recreational, scientific, aesthetic, and commercial  
20 purposes. Plaintiffs and their members derive – or, but for the imperiled status of the steelhead,  
21 would derive – recreational, scientific, aesthetic, and commercial benefits from the existence in  
22 the wild of steelhead through wildlife observation, study, and photography as well as recreational  
23 and commercial fishing. The past, present, and future enjoyment of these benefits by plaintiffs  
24

1 and their members has been, is being, and will continue to be irreparably harmed by the  
2 defendants' disregard of its statutory duties. The aesthetic, conservation, recreational,  
3 commercial, and scientific interests of these groups and their members in the survival and  
4 recovery of Upper Columbia steelhead have been, are being, and unless the relief prayed for is  
5 granted, will continue to be directly and adversely affected by defendants' failure to comply with  
6 the ESA.

7 9. Defendant D. Robert Lohn is the Regional Administrator of the National Marine  
8 Fisheries Service Northwest Regional Office. The NMFS Northwest Regional Office was the  
9 office primarily responsible for the downlisting of Upper Columbia steelhead and for the  
10 development of the Hatchery Listing Policy.

11 10. Defendant National Marine Fisheries Service is an agency of the United States  
12 Department of Commerce responsible for administering the provisions of the Endangered  
13 Species Act ("ESA") with regard to threatened and endangered marine species, including Upper  
14 Columbia steelhead.

#### 15 JURISDICTION AND VENUE

16 11. This Court has jurisdiction pursuant to 16 U.S.C. § 1540(g)(1). As required by  
17 16 U.S.C. § 1540(g)(2), on January 24, 2006, plaintiffs sent 60-day notices to defendants Lohn  
18 and NMFS of their intent to seek judicial review if the legal violations are not corrected. More  
19 than 60 days have passed since defendants Lohn and NMFS received these notices.

20 Alternatively, this Court has jurisdiction pursuant to 28 U.S.C. § 1331 to determine under the  
21 Administrative Procedure Act, 5 U.S.C. § 706, whether the Secretary acted arbitrarily,  
22 capriciously, and contrary to the ESA in downlisting Upper Columbia steelhead from  
23 endangered to threatened. Venue lies in this judicial district by virtue of 16 U.S.C.

24 § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because the violations occurred in this district, and

1 defendant Lohn resides in this district.

2 THE ESA STATUTORY FRAMEWORK

3 12. Congress enacted the ESA “to provide a program for the conservation of ...  
4 endangered species and threatened species” and “to provide a means whereby the ecosystems  
5 upon which endangered species and threatened species depend may be conserved.” 16 U.S.C.  
6 § 1531(b). As the first step in the protection of these species, Section 4 of the ESA, 16 U.S.C.  
7 § 1533, requires the Secretary to list species as endangered or threatened when they meet the  
8 statutory listing criteria.

9 13. The Act defines species to include “any subspecies of fish or wildlife or plants,  
10 and any distinct population segment of any species of vertebrate fish or wildlife which  
11 interbreeds when mature.” Id. § 1532(16). The term “distinct population segment” or “DPS,”  
12 however, is not specifically defined in the Act.

13 14. A species is “endangered” when it “is in danger of extinction throughout all or a  
14 significant portion of its range,” id. § 1532(6), and it is “threatened” when it is likely to become  
15 endangered within the foreseeable future. Id. § 1532(20).

16 15. The Secretaries of Commerce (for most marine species) and Interior (for other  
17 species) are charged with listing species as threatened or endangered based “solely on the basis  
18 of the best scientific and commercial data available . . .,” id. § 1533(b)(1)(A), and whenever  
19 listing is warranted based on any one of the following five listing factors:

- 20 (A) the present or threatened destruction, modification, curtailment of its  
21 habitat or range;
- 22 (B) over utilization for commercial, recreational, scientific, or educational  
23 purposes;
- 24 (C) disease or predation;
- 25 (D) the inadequacy of existing regulatory mechanisms; or
- 26 (E) other natural or manmade factors affecting its continued existence.

Id. § 1533(a)(1). The Secretary of Commerce has delegated his responsibilities under the ESA to

1 NMFS. 50 C.F.R. § 17.2(b).

2 16. The ESA establishes a process for citizens to petition for the listing of species.  
3 Within 90 days after receiving a petition, NMFS is required to make a finding as to whether the  
4 petition presents substantial scientific or commercial information indicating that the listing may  
5 be warranted. 16 U.S.C. § 1533(b)(3)(A). If NMFS finds that the petition presents such  
6 information, it must commence a review of the status of the species, which it typically does by  
7 convening a biological review team comprised of scientific experts in pertinent disciplines. Id.  
8 Within 12 months after receiving the petition, NMFS must make a finding that the listing: (i) is  
9 warranted; (ii) is not warranted; or (iii) is warranted but precluded at that time. 16 U.S.C.  
10 § 1533(b)(3)(B). If NMFS finds that listing is warranted, it must publish a proposed listing  
11 regulation in the Federal Register. Id. § 1533(b)(3)(B)(ii). Within one year of a warranted  
12 finding (or after a six-month extension), the Secretary must either publish in the Federal Register  
13 a final regulation listing the species or withdraw the proposed listing. Id. § 1533(b)(6)(A).  
14 Designation of critical habitat for the species must accompany or soon follow a final listing  
15 regulation. Id. § 1533(b)(6)(C).

16 17. Once a species is listed, various safeguards apply to prevent activities that will  
17 cause harm to members of the species or that will jeopardize the survival and recovery of the  
18 species in its native ecosystem. See id. §§ 1536, 1538. The ESA's ultimate goal is recovery of  
19 listed species to the point where they no longer need ESA protection, id. §§ 1531(b)-(c); 1532(3).

## 20 STATEMENT OF FACTS

### 21 I. PACIFIC STEELHEAD

#### 22 A. Wild Steelhead

23 18. Pacific steelhead (*Oncorhynchus mykiss*) are an anadromous species. Young  
24 steelhead emerge from eggs deposited in the gravel of fresh-water streams. Juvenile steelhead

1 typically spend 2-4 years in freshwater feeding and growing until they are ready to migrate  
2 downstream to the ocean. After 2-3 years, adult steelhead return to the stream where they were  
3 born, traveling sometimes hundreds of miles, where they compete for mates, build nests, deposit  
4 and fertilize their eggs, and generally die, although adult steelhead, particularly females, can  
5 survive spawning, migrate back out to the ocean, and return to spawn a second or on rare  
6 occasions a third time.

7 19. Steelhead evolved over 40 million years in a region characterized by catastrophic  
8 floods, volcanic eruptions, mountain-building events, and ever changing climatic and ocean  
9 conditions. They have developed specialized life-histories, different migration, breeding, and  
10 rearing timing, unique migratory ranges, varied feeding habits, and even specialized resistance to  
11 local parasites and diseases.

12 20. These local adaptations are so specialized that steelhead often differ significantly  
13 from stream to stream, or from river to river. The strength derived from this diversity has  
14 enabled steelhead to colonize and until recently, thrive, in the rivers, streams, lakes, and ocean  
15 regions of the Pacific Northwest and California. A catastrophic event or change in habitat might  
16 favor one portion of the range or run-timing over another. The diversity of survival patterns has  
17 ensured that a river system's entire steelhead population will not be extirpated as the result of  
18 one large disturbance event, such as a storm, wildfire, disease outbreak, or low-water year. The  
19 steelhead's diversity, characterized by adaptation to particular local environmental conditions,  
20 means that steelhead are not seamlessly interchangeable across the landscape. A steelhead  
21 adapted to the local conditions of a particular Alaska stream, for example, differs from a  
22 steelhead adapted to survive in a tributary of the Columbia River.

23 B. Hatchery Steelhead

24 21. Human activities that accompanied European settlement of the Pacific Northwest

1 and California – including overfishing, habitat degradation from logging, agriculture, and dam  
2 building – led to precipitous declines in salmon and steelhead populations. Hatcheries were  
3 developed in an attempt to compensate for and mask these declines by producing more fish for  
4 harvest.

5 22. Salmon and steelhead are produced in hatcheries by killing returning adult  
6 females, removing the eggs, and fertilizing them with sperm from returning adult males. The  
7 eggs are incubated and, in most hatcheries, the emerging young fish are artificially fed and raised  
8 in concrete pools for later release into streams for their migration to salt water. Most hatchery  
9 fish spend their entire freshwater life phase prior to ocean migration in captivity. After feeding  
10 in the ocean for several years, the adult fish generally return to the hatchery, where they are  
11 killed and the artificial propagation process is repeated.

12 23. In sharp contrast to the evolutionary processes that promote diversity in wild fish,  
13 hatcheries tend to produce uniformity by mass producing salmon and steelhead, often from  
14 relatively few adults, and selecting for certain traits. As a result of these characteristics, hatchery  
15 fish lack the diversity found in wild salmon and steelhead. Adult hatchery fish that “stray” from  
16 the hatchery and attempt to spawn in the wild generally have poor reproductive success rates and  
17 their progeny survive at lower rates than the progeny of wild salmon or steelhead. Interbreeding  
18 between hatchery fish and wild salmon reduces the fitness of the population.

19 II. THE SERVICES’ POLICIES DEFINING A DISTINCT POPULATION SEGMENT

20 A. NMFS’s Evolutionarily Significant Unit Policy

21 24. In 1991, NMFS developed an Evolutionarily Significant Unit (“ESU”) Policy,  
22 designed to apply the ESA’s Distinct Population Segment concept to the particular biology of  
23 Pacific salmon and steelhead. 56 Fed. Reg. 58,612 (Nov. 20, 1991). Under this policy:

1 A stock of Pacific salmon will be considered a distinct population, and hence a  
2 “species” under the ESA, if it represents an evolutionarily significant unit (ESU)  
3 of the biological species. A stock must satisfy two criteria to be considered an  
4 ESU:

- 5 1) It must be substantially reproductively isolated from other conspecific  
6 population units; and
- 7 2) It must represent an important component in the evolutionary legacy of the  
8 species.

9 Id. at 58,618. Reproductive isolation need not be absolute, but only “strong enough to permit  
10 evolutionarily important differences to accrue in different population units.” Id. To qualify as  
11 an ESU, a grouping must contribute substantially to the genetic and ecological diversity of the  
12 species as a whole. Id. at 58,612, 58,618.

13 25. When NMFS developed its ESU Policy for defining populations of Pacific  
14 salmonids, the agency based its policy primarily on a 1991 NOAA Technical Memorandum  
15 entitled “Definition of ‘Species’ Under the Endangered Species Act: Application to Pacific  
16 Salmon.” See 56 Fed. Reg. at 58,612 (Nov. 20, 1991). The memorandum specifically addressed  
17 the relationship between hatchery and wild fish in delineating “species” eligible for listing  
18 consideration. Although noting that “the effects of supplementation and straying by hatchery  
19 fish should be considered in evaluating whether a wild population is an ESU,” the paper  
20 reinforced the point that

21 fish hatcheries do not provide a substitute for natural ecosystems that the Act  
22 mandates the Department to conserve. The role of artificial propagation under the  
23 Act is to restore populations in natural habitat to the point where they can be  
24 removed from formal ESA protection. Therefore, only naturally-spawning  
25 populations should be considered in determining whether a population is distinct  
26 for the purposes of the Act.

#### 27 B. The Joint Distinct Population Segment Policy

28 26. NMFS and the Fish and Wildlife Service (“FWS”) published a joint DPS policy  
29 in 1996. 61 Fed. Reg. 4,722 (Feb. 7, 1996). The policy sets forth two requirements for a

1 population to be considered eligible for ESA listing. First, the population must be “discrete”  
2 from other populations of the species. Id. at 4,725. A population segment is discrete if “[i]t is  
3 markedly separated from other populations of the same taxon as a consequence of physical,  
4 physiological, ecological, or behavioral factors. Quantitative measures of genetic or  
5 morphological discontinuity may also provide evidence of this separation.” Id. at 4,725.

6 Second, the population must be significant, which may be shown by its persistence in a unique or  
7 unusual ecological setting, a significant gap in the species’ range that would result from its loss,  
8 its survival as the only natural occurrence of a taxon introduced elsewhere, marked differences in  
9 genetic characteristics, or other information bearing on biological or ecological significance. Id.  
10 at 4,722. When the Services adopted the DPS policy, they described the ESU policy as  
11 “consistent with the policy outlined in this notice” and “a detailed extension of this joint policy.”  
12 61 Fed. Reg. at 4,722, 4,723.

### 13 III. NMFS’S HATCHERY POLICIES

#### 14 A. NMFS’s 1993 Interim Hatchery Policy

15 27. In 1993, NMFS adopted an interim hatchery policy to assess: (1) the extent to  
16 which hatcheries pose a threat to wild salmonids; (2) the concept of reforming some hatcheries to  
17 be used to recover wild stocks; and (3) the criteria for determining whether a particular hatchery  
18 can be used for recovery purposes. 58 Fed. Reg. 17,573 (April 5, 1993). The interim hatchery  
19 policy reiterated that ESA listing decisions would be based on the status of wild salmonids. Id.  
20 at 17,573, 17,575.

21 28. In the interim hatchery policy, NMFS found that hatchery populations harm wild  
22 salmonids by diminishing genetic diversity, reducing the fitness of salmonid populations to  
23 survive in their native streams, competing for territory and mates, and by spreading disease. Id.  
24 at 17,574. NMFS concluded that “[t]hese genetic and ecological risks of artificial propagation

1 can pose serious threats to natural salmon populations,” *id.*, and that hatcheries “should not be  
2 seen as a substitute for resolving the basic problems that brought the species to the point at which  
3 it required ESA protection.” *Id.* at 17,575.

4 29. The interim hatchery policy also discussed under what circumstances a hatchery  
5 could be used as a conservation tool. The interim hatchery policy established criteria and goals  
6 for managing hatcheries for recovery purposes, where it had been deemed appropriate to do so in  
7 accordance with the policy. *Id.* at 17,575-76.

8 30. The interim hatchery policy established a two-part inquiry to determine whether a  
9 particular hatchery located in the geographic area covered by a listed ESU could be used for  
10 recovery. If NMFS determined that a particular hatchery population was both suitable and  
11 essential for recovery, it included the hatchery population in the ESA listing. 58 Fed. Reg. at  
12 17,575. The practical result of NMFS’s application of its interim hatchery policy was that many  
13 ESU’s included both hatchery and wild fish, but, in the case of threatened listings, only the wild  
14 fish were listed and protected under the ESA.

15 B. The Alsea Valley Decision

16 31. In Alsea Valley Alliance v. Evans, 161 F. Supp.2d 1154 (D. Or. 2001), the district  
17 court set aside the threatened listing of the Oregon coast coho on narrow legal grounds. The  
18 court held that once NMFS defined the scope of an ESU, the ESA prohibited listing anything  
19 other than that entire unit. Because NMFS defined the Oregon coast coho ESU to include  
20 hatchery fish along with wild fish, but listed only the wild fish, not the hatchery fish in the final  
21 listing determination, the court found that the agency impermissibly subdivided the ESU. NMFS  
22 chose not to appeal the decision, and the Ninth Circuit determined that it did not have  
23 jurisdiction to hear an appeal by fishing and conservation intervenors because the district court  
24 had remanded the listing for further proceedings. Alsea Valley Alliance v. Evans, 358 F.3d 1181

1 (9<sup>th</sup> Cir. 2004).

2 32. The Alsea Valley decision did not dictate the outcome of future listings, nor did it  
3 prescribe any particular approach for NMFS to take in deciding whether hatchery and wild  
4 salmon and steelhead should be placed in the same or different listing units.

5 C. NMFS's 2005 Hatchery Listing Policy

6 33. NMFS decided to apply the Alsea Valley to all Pacific salmon and steelhead  
7 listings. NMFS conducted updated status reviews for these populations and reviewed the  
8 relationship between the wild and hatchery populations.

9 34. As part of the agency's response to Alsea Valley, NMFS developed the new  
10 Hatchery Listing Policy. In developing this policy, NMFS never seriously considered dividing  
11 wild and hatchery salmonids into separate listing units.

12 35. NMFS settled on this course of action despite the contrary views expressed by six  
13 leading marine scientists that NMFS hired to serve as its respected advisors on salmon recovery.

14 36. NMFS's Northwest Fisheries Science Center appointed a team of leading  
15 scientists to serve as its Recovery Science Review Panel ("RSRP") and provide expert advice to  
16 NMFS on salmon recovery issues. The RSRP unanimously concluded that wild and hatchery  
17 salmonids should be considered separately and accorded different treatment under the ESA. The  
18 RSRP was directed to excise these conclusions from their official report because NMFS  
19 characterized the conclusions as policy matters. The scientists then published the excised portion  
20 of their report in *Science*. "Hatcheries & Endangered Salmon," *Science*, Vol. 303, March 26,  
21 2004. The RSRP concluded that "including hatchery fish in an ESU confounds the risk of  
22 extinction in the wild with ease of captive propagation and ignores important biological  
23 differences between wild and hatchery fish." After reciting the poor survival trends of hatchery  
24 fish as well as their competition with and threats to wild salmon, the scientists added that "[t]he

1 danger of including hatchery fish as part of any ESU is that it opens the legal door to the  
2 possibility of maintaining a stock solely through hatcheries. However, hatcheries generally  
3 reduce current fitness and inhibit future adaptation of natural populations.” The RSRP  
4 recommended that salmonid ESUs be redefined to exclude hatchery fish. Among the identified  
5 problems with including hatchery populations within wild ESUs were (1) hatchery fish could  
6 overwhelm wild fish; (2) hatchery fish could mask the decline of an ESU; and (3) excessive  
7 reliance on hatchery fish could circumvent protection and improvements of habitat.

8 37. A subsequent RSRP report examined “the interactions between hatchery and wild  
9 fish, how hatchery fish may be affecting the populations of wild fish, the scientific issues  
10 surrounding efforts at habitat compensation and restoration that involve hatchery fish, and the  
11 scientific inconsistencies created by [the] hatchery policy.” RSRP Report, at 1 (Aug. 30-Sept. 1,  
12 2004) (available at [http://www.nwfsc.noaa.gov/tr/rsrpreportsept30\\_2004e.pdf](http://www.nwfsc.noaa.gov/tr/rsrpreportsept30_2004e.pdf)). The RSRP  
13 concluded that “[i]n the context of restoring wild self-sustaining populations of salmon, placing  
14 increased emphasis on the future adaptation and continued persistence of an ESU in a changing  
15 environment would justify the categorical exclusion of hatchery fish from most ESUs.” *Id.* at 13.  
16 The panel also noted that “it appears that the new hatchery policy directly violates the thinking of  
17 leading NMFS scientists.” *Id.*

18 38. Other scientific panels and reports echoed these conclusions, including the  
19 Independent Scientific Advisory Board report entitled “Viability of ESUs Containing Multiple  
20 Types of Populations” at 22 (April 8, 2005) (“Hatchery augmentation may be used to ‘buy time’  
21 for a short duration while ecological problems are being addressed, but during this period the  
22 cumulating (probably compounding) genetic/adaptive problems caused by the hatchery phase  
23 reduces the ability of eventual reestablishment”) and the independent panel report, requested by  
24

1 NMFS, “Considering Life History, Behavioral, and Ecological Complexity in Defining  
2 Conservation Units for Pacific Salmon at 13 (May 16, 2005) (“Yes there are biological  
3 differences between hatchery and wild fish that arise because of the differences between artificial  
4 and natural environments. These differences could be used to justify the exclusion of hatchery  
5 fish from an ESU even when they are phylogenetically related to wild fish and even when the  
6 hatchery fish are progeny of wild fish that belong to an ESU.”).

7 39. Since NMFS lumped wild and hatchery salmon and steelhead into the same listing  
8 units, it next had to decide how to treat the hatchery fish in making listing decisions. In the  
9 summer of 2002, the Fisheries Service released a draft policy to co-managers that would  
10 continue to protect wild salmon and steelhead based on their declining population numbers. In  
11 other words, this draft policy would have based listing decisions on the status of wild salmon and  
12 steelhead in their natural habitat. While hatchery fish might be included in the ultimate listing,  
13 they would not be counted in making listing and delisting decisions.

14 40. In June 2004, NMFS formally proposed a new Hatchery Listing Policy. 69 Fed.  
15 Reg. 31,354 (June 3, 2004). The proposed Hatchery Listing Policy stated that NMFS would  
16 include hatchery fish within an ESU with wild fish if the hatchery fish were no more divergent  
17 than “what would be expected between closely related populations within the ESU.” Id. at  
18 31,358. The proposed policy also stated that status determinations for the ESU would be based  
19 on the entire population, both hatchery and wild fish. Id.

20 41. NMFS issued the final Hatchery Listing Policy on June 16, 2005. 70 Fed. Reg.  
21 37,204 (June 28, 2005).

22 42. The Hatchery Listing Policy has four components. First, the policy summarizes  
23 NMFS’s existing ESU policy. Id. at 37,215. Second, it describes the process NMFS will use to  
24

1 delineate when hatchery populations will be included in an ESU. Id. NMFS will include  
2 hatchery fish within an ESU that have “a level of genetic divergence relative to the local natural  
3 population(s) that is no more than what occurs within the ESU.” Id.

4 43. Third, the policy provides that status determinations for Pacific salmonid ESUs  
5 will be based on the entire ESU, including the hatchery fish included within the ESU. Id.

6 44. Fourth, in making status determinations for Pacific salmonids, NMFS will  
7 generally consider abundance, productivity, genetic diversity, and spatial distribution. Id. The  
8 Hatchery Listing Policy explicitly notes that “[t]he presence of hatchery fish within an ESU can  
9 positively affect the overall status of the ESU, and thereby affect a listing determination, by  
10 contributing to increasing abundance and productivity of the natural populations in the ESU, by  
11 improving spatial distribution, by serving as a source population for repopulating unoccupied  
12 habitat, and by conserving genetic resources of depressed natural populations in the ESU.” Id.  
13 Where a hatchery produces more fish than are immediately useful for conservation purposes,  
14 NMFS will, where appropriate, exercise its authority under section 4(d) to exclude listed  
15 hatchery fish from the ESA’s take prohibition, which would allow harvest of the hatchery fish  
16 that are surplus to current conservation needs. Id. at 37,215-16.

#### 17 IV. THE UPPER COLUMBIA STEELHEAD LISTING DETERMINATION.

18 45. In 1997, NMFS listed Upper Columbia steelhead as endangered due to dramatic  
19 declines in natural run sizes and the inability of naturally spawning steelhead to replace  
20 themselves. 62 Fed. Reg. 43,937, 43,949-50 (Aug. 18, 1997). Based on these trends, NMFS  
21 concluded that “natural steelhead populations in the Upper Columbia River Basin are not self-  
22 sustaining at the present time,” id. at 43,949, and that “if present trends continue, this ESU will  
23 not be viable.” Id. at 43,950. Upon concluding that the Wells Hatchery could be used for  
24 recovery purposes, NMFS included this but no other hatchery in the Upper Columbia steelhead

1 listing. Id. at 43,946, 43,951.

2 46. The 1997 listing recognized that hatcheries can pose a threat to wild steelhead  
3 survival and recovery: “Competition, genetic introgression, and disease transmission resulting  
4 from hatchery introductions may significantly reduce the production and survival of native,  
5 naturally-reproducing steelhead.” Id. at 43,944. In the Upper Columbia basin, “[h]atchery  
6 programs intended to compensate for habitat losses have masked declines in natural stocks and  
7 have created unrealistic expectations for fisheries,” id., and had “reduced opportunity for  
8 maintenance of locally adapted genetic lineages among different drainages.” Id. at 43,949-50.  
9 NMFS identified the high proportion of hatchery fish as a “considerable threat to steelhead in  
10 this region.” Id. at 43,949-50. NMFS has authorized Washington Department of Fish and  
11 Wildlife to allow recreational fishing of returning hatchery steelhead to reduce the genetic  
12 diversity threats they pose to wild steelhead and to lessen competition between the wild and  
13 hatchery steelhead for limited habitat. ESA Section 7 Consultation No. 2002/000981.  
14 [http://seahorse.nmfs.noaa.gov/pls/pcts-pub/sxn7.biop\\_results\\_detail?reg\\_inclause\\_in=](http://seahorse.nmfs.noaa.gov/pls/pcts-pub/sxn7.biop_results_detail?reg_inclause_in=(NWR)&idin=10608)  
15 [\('NWR'\)&idin=10608.](http://seahorse.nmfs.noaa.gov/pls/pcts-pub/sxn7.biop_results_detail?reg_inclause_in=(NWR)&idin=10608)

16 47. NMFS applied the new hatchery policy in deciding to downlist Upper Columbia  
17 steelhead from endangered to threatened based on the numbers of returning hatchery fish. In  
18 1997, NMFS listed Upper Columbia steelhead as an ESU, while the 2006 listing applies the DPS  
19 policy and defines Upper Columbia steelhead as a DPS.

20 48. A majority of the biological review team convened to conduct updated salmon  
21 and steelhead status reviews had recommended an endangered listing based on the poor  
22 productivity of the Upper Columbia steelhead ESU and in particular of the wild steelhead.  
23 71 Fed. Reg. 834, 854-55 (Jan. 5, 2006). The 5-year mean abundances for naturally spawned  
24

1 populations were only 14-30% of the interim recovery targets. Id. at 854. NMFS noted with  
2 concern that the “extremely low replacement rate of naturally spawning fish” had not improved  
3 since the previous status review. Id. While the natural component of one run had increased, this  
4 pattern was not replicated elsewhere. Id.

5 49. NMFS deviated from the biological review team’s endangered recommendation  
6 based on the inclusion of six hatcheries in the DPS. Id. at 849, 854. Because the hatcheries  
7 increase overall abundance, NMFS concluded that they mitigate the immediacy of the extinction  
8 risk in the short-term. Id. at 854. At the same time, NMFS expressed concern that excess  
9 hatchery spawners, particularly from hatcheries that flood the Methow basin with large numbers  
10 of hatchery fish, may cause a threat by decreasing overall DPS productivity and local adaptation.  
11 Id. The fact that 70-90% of adult returns consist of hatchery fish raises “a significant source of  
12 concern for the DPS’s diversity and generates uncertainty in evaluating trends in natural  
13 abundance and productivity.” Id. Despite finding that the hatchery fish pose a threat to wild  
14 salmon survival and recovery, NMFS included hatchery fish in the DPS and downgraded the  
15 listing from endangered to threatened based on the numbers of hatchery fish.

16 50. The downlisting changes ESA protections because the ESA gives NMFS the  
17 authority to decide whether and the extent to apply the take prohibition to threatened species.  
18 16 U.S.C. § 1533(d). Previously, NMFS has carved out exceptions to the take prohibition to  
19 create incentives for various sectors to adopt protective measures. 70 Fed. Reg. 37,160 (June 28,  
20 2005). NMFS has indicated that it will amend its 4(d) rule to apply the take prohibition and  
21 various exceptions to that prohibition to Upper Columbia steelhead. See 71 Fed. Reg. at 858.

## 22 CAUSES OF ACTION

23 51. This case challenges three actions on overlapping grounds: (1) NMFS’s Hatchery  
24 Listing Policy, which provides the underpinning for the Upper Columbia steelhead downlisting;

1 (2) NMFS’s downlisting of Upper Columbia steelhead from endangered to threatened; and  
2 (3) NMFS’s denial of the petition to divide wild and hatchery salmonids into separate listing  
3 units, based in particular on the DPS policy and on the threat that hatchery fish pose to wild ones.  
4 The first and third causes of action present grounds for invalidating both the Hatchery Listing  
5 Policy and the downlisting of Upper Columbia steelhead.

6 ALLEGATIONS UNDERLYING ALL CAUSES OF ACTION

7 I. THE ESA PROTECTS SPECIES’ ABILITY TO SUSTAIN THEMSELVES IN THEIR  
8 NATURAL HABITAT WITHOUT HUMAN INTERVENTION.

9 52. Congress enacted the ESA “to provide a means whereby ecosystems upon which  
10 endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). As  
11 the Senate Report explained, “many [imperiled species] perform vital biological services to  
12 maintain a ‘balance of nature’ within their environments.” S. Rep. No. 307, 93d Cong., 1st  
13 Sess. 2 (1973). The House of Representatives underscored the need to conserve threatened and  
14 endangered species because of “the critical nature of the interrelationships of plants and animals  
15 between themselves and with their environment.” H.R. Rep. No. 412, 93d Cong., 1st Sess.  
16 (1973); see also H.R. Rep. No. 1625, 95<sup>th</sup> Cong., 2d Sess. 5 (1978) (“The primary purpose of the  
17 Endangered Species Act of 1973 is to prevent animal and plant species endangerment and  
18 extinction caused by man’s influence on ecosystems, and to return the species to the point where  
19 they are viable components of their ecosystems”). By stressing the importance of ecosystem  
20 protection, Congress made it clear that the Act seeks to protect the ability of species to sustain  
21 themselves in their natural environments.

22 53. Under Section 7 of the ESA, federal agencies must ensure that their actions will  
23 not “jeopardize the continued existence of any endangered species or threatened species . . . .”  
24 16 U.S.C. § 1536(a)(2). Implementing regulations issued jointly by NMFS and the Fish and

1 Wildlife Service define the phrase “jeopardize the continued existence” to mean “to engage in an  
2 action that reasonably would be expected, directly or indirectly, to reduce appreciably the  
3 likelihood of both the survival and recovery of a listed species in the wild . . . .” 50 C.F.R.  
4 § 402.02 (emphasis added). In 1982, Congress expressly endorsed this regulation by  
5 incorporating this language into the jeopardy criteria for the Services’ approval of habitat  
6 conservation plans and issuance of incidental take permits. 16 U.S.C. § 1539(a)(2)(B)(iv). This  
7 focus on the survival and recovery of a species to self-sustaining levels in the species’ natural  
8 environment is fundamental to the ESA.

9       54. Once a species is listed, the goal of the ESA’s protective scheme is to recover or  
10 conserve the species. Toward this end, the ESA defines “conservation” as “the use of all  
11 methods and procedures which are necessary to bring any endangered species or threatened  
12 species to the point at which the measures provided pursuant to [the ESA] are no longer  
13 necessary.” 16 U.S.C. § 1532(3). Accordingly, a recovered species would be able to sustain  
14 itself without human intervention and the Act’s other special protections.

## 15 II. HATCHERIES ARE DESIGNATED AS A CONSERVATION TOOL UNDER THE 16 ESA.

17       55. The Act identifies hatcheries or artificial propagation as a tool that can be used to  
18 conserve listed species. The definition of “conserve” and “conservation” specifically lists  
19 propagation, along with live trapping and transplantation, among the authorized conservation  
20 methods and procedures. Id. Hatcheries are, therefore, not an end in themselves. Instead, they  
21 are a means to achieve an end – the recovery of the species to the point where ESA protections  
22 are no longer required. Denying imperiled wild steelhead populations ESA listing status or  
23 endangered status because hatcheries can produce large influxes of steelhead runs afoul of this  
24 role ascribed by the ESA to artificial propagation. Because artificial propagation is a temporary

1 tool for conserving species, ESA protections cannot be denied or diminished by relying on  
2 hatcheries to artificially and perpetually increase steelhead abundance.

3 56. Since conservation measures are employed to bring a species to the point where it  
4 no longer needs the Act's safeguards, it follows that a recovered species must be able to sustain  
5 itself without a constant influx of hatchery fish. For the Upper Columbia steelhead, this means  
6 that the naturally spawning steelhead must replace themselves, which currently does not occur  
7 and was one of the principal reasons for the 1997 endangered listing.

8 FIRST CAUSE OF ACTION

9 The Upper Columbia Steelhead Downlisting ESU Runs Counter to the ESA, the  
10 Best Available Science, and the DPS Policy and is Arbitrary and Capricious.

11 57. By including hatchery fish in the Upper Columbia steelhead DPS, NMFS  
12 included fish in the DPS that are not listable in their own right.

13 58. Including hatchery fish in an ESA listing runs counter to the ESA goal of  
14 protecting species in their natural environments. Not only are hatcheries susceptible to  
15 mechanical malfunctions, disease, and budget shortfalls, but they fertilize and hatch steelhead  
16 eggs and raise the offspring in captivity. The adult hatchery fish then return to the hatchery at  
17 the end of their lives to repeat the cycle of human intervention. Through their dependence on  
18 human intervention for their reproduction and freshwater life cycle, hatchery populations are not  
19 self-sustaining. Instead, hatchery fish depend on artificial conditions and environments for their  
20 survival.

21 59. When hatchery fish stray and try to spawn in rivers, they have less success in  
22 mating and producing viable offspring than their wild cousins. Inbreeding between hatchery and  
23 wild salmon reduces the fitness of the progeny and the population as a whole. It is for these  
24 reasons that NMFS found that hatchery populations pose a threat to wild steelhead survival.

1 NMFS acknowledged that large hatchery releases may overwhelm wild steelhead and lead to  
2 their extirpation, in which case there would be nothing left to list. 69 Fed. Reg. at 33,133-34. It  
3 is arbitrary and contrary to the best available science for NMFS to include populations that pose  
4 a threat to a species' ability to sustain itself in the wild in DPS. Such a listing is likely to  
5 perpetuate and even exacerbate the threat by making the Act's protective scheme available to the  
6 populations that pose a threat.

7 60. Because hatcheries can pose a threat to the wild salmon and steelhead survival  
8 and recovery, they must be managed to promote the ESA's goals rather than listed under the Act.  
9 If a federal hatchery is likely to jeopardize the survival and recovery of wild steelhead, it would  
10 violate Section 7. If any hatchery would cause incidental "take" of endangered steelhead, it  
11 would violate Section 9.

12 61. Lumping wild and hatchery steelhead together into a single DPS or ESU runs  
13 counter to the best available science, including the views expressed by NMFS's scientific  
14 advisors and other esteemed scientific bodies.

15 62. The Upper Columbia steelhead downlisting is arbitrary, capricious, contrary to the  
16 best available scientific information, and in violation of the ESA because it treats hatchery fish as  
17 listable entities under the ESA and it lumps wild and hatchery steelhead into a single DPS.

18 63. Even if NMFS could place wild and hatchery steelhead into the same ESU/DPS, it  
19 had to base its listing decision on the numbers and status of the wild steelhead because the ESA  
20 protects species' ability to survive and recover in the wild.

21 64. NMFS previously based its listing determinations on the abundance of only those  
22 salmonids that lived their entire life cycle in the wild in making listing decisions. NMFS would  
23 "count" salmonids that were the progeny of natural spawning of either wild-borne or hatchery-

1 borne salmonids, or a combination of the two. This approach served the ESA's goals of  
2 providing protection to species that currently are not self-sustaining in the wild.

3 65. NMFS has reversed course and considered hatchery fish to make a positive  
4 contribution to overall abundance of Upper Columbia steelhead even where the hatchery fish  
5 have not successfully spawned and produced viable progeny. NMFS considered such hatchery  
6 fish to make a positive contribution to overall abundance even if the large numbers of hatchery  
7 fish pose a threat to the long-term viability of the wild populations, as NMFS found to be the  
8 case for Upper Columbia steelhead. In the listing determination, NMFS acknowledged that the  
9 numbers of hatchery fish included in this DPS may overwhelm the wild steelhead and if this  
10 occurs, there will be nothing left to list. Hatchery fish that have been released into streams but  
11 have not spawned and produced viable progeny cannot be counted in ESA listing determinations  
12 because they are not self-sustaining in the wild.

13 66. The best available science, as articulated by NMFS's scientific advisors and other  
14 available science, compels separate treatment of wild and hatchery salmon and steelhead in  
15 conducting status reviews and making listing determinations because hatchery fish are often a  
16 threat to the long-term survival and recovery of wild salmonids. NMFS downlisted Upper  
17 Columbia steelhead based primarily on the numbers of hatchery fish, even though it concurrently  
18 found that the large numbers of hatchery fish pose a threat to wild steelhead survival and  
19 recovery. NMFS's rationale for downlisting Upper Columbia steelhead runs counter to the  
20 majority recommendation of the biological review team and the science in the record on the  
21 status and trends of this DPS.

22 67. NMFS acted arbitrarily, capriciously, contrary to the best available science and  
23 the ESA, and at odds with its past policy without an adequate explanation for the reversal, in  
24

1 downlisting Upper Columbia steelhead from endangered to threatened status based, in significant  
2 part, on the numbers of hatchery fish that have not yet spawned and produced viable progeny.

3 SECOND CAUSE OF ACTION

4 The Hatchery Listing Policy Runs Counter to the ESA, the  
5 Best Available Science, and Is Arbitrary and Capricious.

6 68. By including hatchery fish in an ESU, the Hatchery Listing Policy includes fish in  
7 the ESU that are not listable in their own right.

8 69. Including hatchery fish in an ESA listing runs counter to the ESA goal of  
9 protecting species in their natural environments. Not only are hatcheries susceptible to  
10 mechanical malfunctions, disease, and budget shortfalls, but they fertilize and hatch steelhead  
11 eggs and raise the offspring in captivity. The adult hatchery fish then return to the hatchery at  
12 the end of their lives to repeat the cycle of human intervention. Through their dependence on  
13 human intervention for their reproduction and freshwater life cycle, hatchery populations are not  
14 self-sustaining. Instead, hatchery fish depend on artificial conditions and environments for their  
15 survival.

16 70. When hatchery fish stray and try to spawn in rivers, they have less success in  
17 mating and producing viable offspring than their wild cousins. It is for this reason that NMFS  
18 found that hatchery populations pose a threat to wild salmon and steelhead survival. NMFS  
19 acknowledged that large hatchery releases may overwhelm wild salmon and steelhead and lead  
20 to their extirpation, in which case there would be nothing left to list. 69 Fed. Reg. at 33,133-34.  
21 It is arbitrary and contrary to the best available science for NMFS to include populations that  
22 pose a threat to a species' ability to sustain itself in the wild in ESU or DPS. Such a listing is  
23 likely to perpetuate and even exacerbate the threat by making the Act's protective scheme  
24 available to the populations that pose a threat.

1           71.     Because hatcheries can pose a threat to the wild salmon and steelhead survival  
2 and recovery, they must be managed to promote the ESA’s goals rather than listed under the Act.  
3 If a federal hatchery is likely to jeopardize the survival and recovery of wild steelhead, it would  
4 violate Section 7. If any hatchery would cause incidental “take” of endangered steelhead, it  
5 would violate Section 9.

6           72.     Lumping wild and hatchery steelhead together into a single DPS or ESU runs  
7 counter to the best available science, including the views expressed by NMFS’s scientific  
8 advisors and other esteemed scientific bodies.

9           73.     The Hatchery Listing Policy is arbitrary, capricious, contrary to the best available  
10 scientific information, and in violation of the ESA, because it treats hatchery fish as listable  
11 entities under the ESA and it lumps wild and hatchery salmonids into a single ESU.

12          74.     Even if NMFS could place wild and hatchery steelhead into the same ESU/DPS, it  
13 had to base its listing decision on the numbers and status of the wild steelhead because the ESA  
14 protects species’ ability to survive and recover in the wild.

15          75.     NMFS previously based its listing determinations on the abundance of only those  
16 salmonids that lived their entire life cycle in the wild in making listing decisions. NMFS would  
17 “count” salmonids that were the progeny of natural spawning of either wild-borne or hatchery-  
18 borne salmonids, or a combination of the two. This approach served the ESA’s goals of  
19 providing protection to species that currently are not self-sustaining in the wild.

20          76.     NMFS has reversed course and considered hatchery fish to make a positive  
21 contribution to overall abundance of an ESU or DPS even where the hatchery fish have not  
22 successfully spawned and produced viable progeny. NMFS considered such hatchery fish to  
23 make a positive contribution to overall abundance even if the large numbers of hatchery fish  
24

1 pose a threat to the long-term viability of the wild populations. Hatchery fish that have been  
2 released into streams but have not spawned and produced viable progeny cannot be counted in  
3 ESA listing determinations because they are not self-sustaining in the wild.

4 77. The best available science, as articulated by NMFS's scientific advisors and other  
5 available science, compels separate treatment of wild and hatchery salmon and steelhead in  
6 conducting status reviews and making listing determinations because hatchery fish are often a  
7 threat to the long-term survival and recovery of wild salmonids.

8 78. NMFS acted arbitrarily, capriciously, contrary to the best available science and  
9 the ESA, and at odds with its past policy without an adequate explanation for the reversal, in  
10 adopting a Hatchery Listing Policy that allows hatchery fish to be considered in assessing the  
11 abundance and status of a DPS/ESU.

### 12 THIRD CAUSE OF ACTION

#### 13 NMFS Acted Arbitrarily, Capriciously, in Disregard of the Best Available Science, 14 and Contrary to the ESA in Denying the Petition to Split Hatchery and Wild Steelhead Into Separate ESUs/DPSs

15 79. In April 2002, commercial and recreational fishing organizations and  
16 conservation groups submitted petitions asking NMFS to divide wild and hatchery salmon and  
17 steelhead into separate ESUs/DPSs and to list the wild ESUs/DPSs. The petitions presented  
18 extensive scientific information: (1) on the differences between natural and hatchery populations  
19 in their behavior, reproductive success, genetic composition, and fitness for survival in the wild;  
20 and (2) on the adverse impacts of hatchery production on the habitat, survival, and genetic fitness  
21 of natural populations. NMFS found that the petitions presented substantial scientific  
22 information indicating that the listing may be warranted. 67 Fed. Reg. 48,601, 48,602 (July 25,  
23 2002).

24 80. The petitions presented evidence that splitting the wild and hatchery fish into

1 separate ESUs would be consistent with the ESU policy. First, hatchery fish are substantially  
2 reproductively isolated since most hatchery fish do not spawn in the wild. See 56 Fed. Reg. at  
3 58,618 (ESU must be substantially reproductively isolated). Even those hatchery fish that stray  
4 are distinct from wild salmon because of their poor reproductive performance. Second, hatchery  
5 fish represent a different evolutionary legacy than their wild cousins because they have less  
6 genetic diversity and are generally bred for traits that increase survival in the hatchery, such as  
7 early run timing, and they have poorer reproductive performance, which impedes their ability to  
8 survive in the wild and distinguishes them from wild salmon adapted to their native streams. Id.  
9 (ESU must represent an important evolutionary legacy).

10 81. The petitions also presented evidence that splitting hatchery fish into a separate  
11 listing unit is warranted under the DPS policy. First, hatchery populations are discrete or  
12 markedly separate from wild salmon based on their behavioral, reproductive, and run-timing  
13 differences, as well as their susceptibility to disease and competition with wild salmon for  
14 territory and mates. 61 Fed. Reg. 4,722 (defining discreteness as population's marked  
15 separateness from other populations). Second, hatchery populations lack the same significance  
16 to the persistence of salmon in the wild. Unless the hatchery population embodies the last  
17 remnants of a population, its loss will not produce a significant gap in the species' range. Id.  
18 (defining significance in terms of the population's role as the last remnant or the gap its loss  
19 would create).

20 82. NMFS denied the petitions in connection with the proposed Hatchery Listing  
21 Policy for two reasons. 69 Fed. Reg. 33,102, 33,112 (June 14, 2004). First, NMFS focused  
22 exclusively on the genetic similarities between the wild salmonids and the broodstock used in  
23 hatcheries without addressing their ecological and behavioral differences or whether hatchery  
24

1 fish are eligible for ESA protection in their own right. Second, although NMFS recognized that  
2 hatchery fish often pose a threat to wild populations, it believed “consideration of threats faced  
3 by an ESU” is “not appropriate” when defining what constitutes a distinct population segment or  
4 ESU. Id. NMFS never applied the DPS policy in deciding how to treat the wild and hatchery  
5 fish.

6 83. It was arbitrary, capricious, and contrary to the ESA for NMFS to refuse to  
7 consider the petitions’ proposal to divide hatchery and wild salmonids into separate listing units  
8 based on NMFS’s exclusive focus on genetic considerations to the exclusion of ecological and  
9 behavioral differences.

10 84. NMFS acted arbitrarily and capriciously by applying only the ESU policy, and  
11 not the DPS policy, in developing the Hatchery Listing Policy and its decision to lump hatchery  
12 and wild steelhead into one ESU, when it ultimately listed the steelhead as a DPS instead of an  
13 ESU. Had NMFS applied the DPS policy, rather than the ESU policy, it would have given  
14 greater weight to the physical, life history, geographic, and ecological differences between wild  
15 and hatchery salmonids than it did under the ESU policy. NMFS erred by not taking these same  
16 DPS policy factors into account in deciding whether hatchery fish belong in the Upper Columbia  
17 steelhead DPS.

18 85. NMFS acted arbitrarily, capriciously, and contrary to the ESA by deeming it  
19 inappropriate to consider the threats posed by hatchery steelhead to wild steelhead in configuring  
20 the DPS or ESU. This error is compounded by NMFS’s treatment of the large numbers of  
21 hatchery fish that pose a threat to wild steelhead as making a positive contribution to overall  
22 abundance of the Upper Columbia steelhead DPS.

23 PRAYER FOR RELIEF

24 WHEREFORE, plaintiffs respectfully request that the Court:

1           A.     Declare that NMFS acted arbitrarily, capriciously, and contrary to the best  
2 available science and the ESA in adopting the Hatchery Listing Policy;

3           B.     Declare that NMFS acted arbitrarily, capriciously, and contrary to the best  
4 available science and the ESA in denying the petitions and refusing to consider the propriety of  
5 including hatchery populations that are a threat to wild salmonid survival in configuring the DPS  
6 or ESU for Upper Columbia steelhead;

7           C.     Declare that NMFS acted arbitrarily, capriciously, and contrary to the best  
8 available science and the ESA in failing to apply the DPS policy in deciding whether to include  
9 hatchery fish in the Upper Columbia steelhead DPS;

10          D.     Declare that NMFS acted arbitrarily, capriciously, and contrary to the best  
11 available science and the ESA, in downlisting the Upper Columbia steelhead from endangered to  
12 threatened;

13          E.     Set aside the downlisting of Upper Columbia steelhead from endangered to  
14 threatened and state that the prior endangered listing remains in effect;

15          F.     Declare that the Hatchery Listing Policy is invalid;

16          G.     Remand with instructions to NMFS to consider the petition's proposal to split  
17 hatchery and wild Upper Columbia steelhead into separate DPSs or ESUs;

18          H.     Award the plaintiffs their costs, expenses, and attorney fees pursuant to the  
19 citizen-suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g)(4), or the Equal  
20 Access to Justice Act, 28 U.S.C. § 2412(d); and

21          I.     Grant such further relief as the Court deems proper.  
22  
23  
24

1 Respectfully submitted this 6<sup>th</sup> day of April, 2006.  
2  
3

4 /s/ Patti Goldman

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